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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3870

OLD TIME ENTERPRISES, INC.,

Plaintiff,

VERSUS

MICHAEL L. BROWNING, et al.,

Defendants,

INTERNATIONAL COFFEE CORP. and
CARLOS NOTTEBOHM

Defendants -Appellees,

VERSUS

LOUIS R. KOERNER, JR.,
Movant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-89-1371 (H))

Before REAVLEY, SMITH, and EMILIO M. GARZA,

Circuit Judges.

JERRY E. SMITH, Circuit Judge:* *

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* 'Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular

Louis R. Koerner, Jr., challenges the district court's imposition of sanctions imposed pursuant to Fed. R. Civ. P. 11, contending that the district court insufficiently supported its ruling and that Koerner was not a proper party to sanction. Finding no merit in these contentions, we affirm.

I.

In 1986, Old Time Enterprises, Inc. ("Old Time"), filed a Racketeer Influenced and Corrupt Organizations Act ("RICO") complaint against International Coffee Corporation ("ICC") and several of its officers, including Carlos Nottebohm. The district court dismissed the complaint, and we affirmed but modified the dismissal to be without prejudice. *Old Time Enters. v. Int'l Coffee Corp.*, 862 F.2d 1213, 1219-20 (5th Cir. 1989).

In 1989, Old Time filed a second RICO complaint in-

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cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

volving the same business relationships among the same parties. ICC moved to dismiss the complaint and moved for sanctions against Old Time and its attorney, Louis Koerner.

On August 18, 1989, the district court found in favor of ICC and imposed, but did not fix the amount of, sanctions for the costs associated with filing the RICO claim. The district court found that Old Time's 150-page RICO claim was "vague, confusing, and . . . essentially incomprehensible." Specifically, the court objected to paragraphs referenced within paragraphs and a muddled jumble of attached schedules and exhibits. The court went on to show that Old Time's complaint was "woefully inadequate" because it attempted to establish the existence of a RICO "enterprise" only through conclusionary allegations and irrelevant documents. Finally, the court determined that this fourth set (including amended complaints) of unclarified generalities that Old Time threw together "failed once again even to approach compliance with the requirements so clearly outlined" previously.

The next day the district court entered judgment and imposed sanctions in favor of the defendants and against the plaintiff, Old Time, without mentioning Koerner by name. In an amended notice of appeal, Koerner wrote, "Louis R. Koerner, Jr. hereby appeals from all orders granting sanctions. . . . and any other final or interlocutory order that affects or is adverse to his interests." In an unpublished opinion, *Old Time Enters. v. Int'l Coffee Corp.*, No. 89-3763 (5th Cir. July 12, 1990), we affirmed the judgment in all respects.

ICC then filed a motion to fix the amount of sanctions at $47,373.58, representing attorneys' fees and costs. Before the district court ruled on this motion, Old Time and ICC reached a settlement, as part of which ICC agreed not to pursue sanctions against Old Time but specifically reserved its right to do so against Koerner. After the settlement, the court held a hearing on the sanctions issue, at which Koerner argued that because the district court had never imposed sanctions on him by name, he was not liable. The court disagreed, affirming that the August 18, 1989,

order had intended to impose sanctions on Koerner.

After the hearing, ICC filed a second motion for sanctions and submitted documentation justifying its costs and fees. On September 10, the district court ruled on sanctions. It considered "all of the circumstances, including the total expenses which have been incurred, Mr. Koerner's relative impecuniosity, and the necessity for deterrence . . ." and ordered Koerner to pay a total of $25,000 ($12,500 to each of ICC and Nottebohm) in sanctions.

II.

We review "all aspects" of a district court's award of sanctions under an abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). *See also Thomas v. Capital Sec. Servs.*, 836 F.2d 866, 872 (5th Cir. 1988) (en banc); *Akin v. Q-L Invs.*, 959 F.2d 521, 534 (5th Cir. 1992). Under this standard, we shall not reweigh evidence and reconsider facts already weighed and considered by the district court. *Cooter & Gell*, 496 U.S. at 404. Rather, we shall uphold a district court's award of sanctions if that court has offered substantial justification for finding a rule

11 violation. *Id.* at 405.

In *Thomas*, 836 F.2d at 883, we explicitly stated that a district court need not make specific findings and conclusions in all rule 11 cases. We did stress "the importance of an adequate record for appellate review in those cases in which the violation is not apparent on the record and the basis and justification for the trial judge's Rule 11 decision is not discernible." *Id.* In other words, we shall rigorously review the district court's award of sanctions to ICC in order to ensure that justification for the district court's decision is present in the record.

Koerner basically argues two points on appeal. First, he contends that the district court failed to make detailed findings necessary to back up its imposition of severe monetary sanctions. By omitting such findings, Koerner asserts that the district court has abused its discretion and we must remand.

We disagree. In *Thomas, id.*, we specifically chose not to force district courts to make detailed factual findings every time they award sanctions. In *Willy v. Coastal Corp.*,

915 F.2d 965, 966 (5th Cir. 1990), we confronted a similar situation in which the district court sanctioned an attorney who filed a 110-page motion for summary judgment along with 1200 pages of unorganized supporting material. The district court found that the attorney had filed confusing, misleading pleadings, including a baseless RICO claim, and assessed $19,307 in rule 11 sanctions. *Id.* at 966, 968. We reviewed the record and, given the district court's better position to marshal the necessary facts and figures, found that it disclosed ample support for the district court's determination of the amount of sanctions. *Id.* at 968.

In *Jennings v. Joshua Indep. School Dist.*, 948 F.2d 194, 199 (5th Cir. 1991), we emphasized another restriction on rule 11 cases: Sanctions must be limited to expenses directly caused by filing the baseless complaint in the district court. A further requirement we have placed on sanctions is that they be the "least severe sanction" adequate to accomplish the purposes of rule 11.

Our review of the record shows that the district court did not abuse its discretion in awarding sanctions of

$25,000. The record shows that ICC spent $47,373.58 to defend itself from Old Time's baseless RICO claims. The district court considered this amount and then reduced it. It felt the less severe sanction of $25,000 better suited the purposes of rule 11. Following the lessons of the Supreme Court in *Cooter & Gell* and our own words in *Thomas*, we shall not reconsider the district court's determination of the appropriate amount of sanctions, as the record adequately reflects the district court's choice of the amount of sanctions. It considered all of the circumstances and concluded that $25,000 was the least severe sanction necessary to implement the policy of rule 11.

Koerner's second main contention is that the district court inappropriately sanctioned him in that the court did not mention him by name in its August 18, 1989, order imposing sanctions. Koerner first argues that when we affirmed that order in 1990 without mentioning him, we rendered the sanctions claim *res judicata*. We do not accept this argument: The district court still retained the power to decide the amount of sanctions and the parties to be

sanctioned.

An award of attorneys' fees is collateral to the merits of an action. *Deloach v. Delchamps Inc.*, 897 F.2d 815, 826 (5th Cir. 1990). The district court had not set the amount of sanctions in its August 18 order or August 19 judgment. It explicitly stated that it would hold a hearing at a later date to determine the specifics of the sanction award. When we affirmed the judgment, we did not make all of its aspects *res judicata*, but only the fact that sanctions would be forthcoming.

Next, Koerner argues that the settlement between Old Time and ICC, which gave up pursuit of sanctions against Old Time, meant that no sanctions could be imposed on Koerner. Quite the opposite is true. Once a court has determined that a party has violated rule 11, the court is duty-bound to impose some form of sanctions on that party. *Thomas*, 836 F.2d at 876. The court found that Koerner, as signer of the pleadings, had violated rule 11. It therefore rightfully sanctioned Koerner, regardless of any settlement between Old Time and ICC.

Koerner cannot now claim that he had no knowledge that he was to be sanctioned. In the notice of appeal filed right after the August 19, 1989, judgment, Koerner writes that he appeals any sanctions adverse to his interests. In the settlement negotiations between Old Time and ICC, ICC specifically reserved its rights to pursue sanctions against Koerner. Koerner obviously had knowledge that the sanctions referred to in the August 18 order referred to him. As an attorney who signed the sanctionable pleadings, Koerner knew, from the district court's first mention of sanctions, that he was liable for them.

For the foregoing reasons, we AFFIRM the decision of the district court.

MINUTE ENTRY
DUPLANTIER, J.
SEPTEMBER 10, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT Of LOUISIANA

OLD TIME ENTERPRISES, INC.	CIVIL ACTION
VERSUS	NO. 89-1371
INTERNATIONAL COFFEE CORP., WILLIAM G. MADARY, MICHAEL L. BROWNING, CARLOS L. NOTTEBOHM AND CLIFFORD SPUHLER	SECTION "H"

The motion of International Coffee Corporation and Carlos Nottebohm for Rule 11 sanctions was granted on an earlier date. On August 28, 1991, the motion to fix amount and for further sanctions was taken under advisement. For the following reasons, Louis Koerner is ordered to pay $12,500 to defendant International Coffee Corporation and $12,500 to defendant Carlos Nottebohm as sanctions.

Movers contend that Louis Koerner should be compelled to pay nearly $29,000 to Carlos Nottebohm and nearly $28,000 to International Coffee Corp., the amounts which they claim to have expended in defense of sanction-

able conduct. Without attempting to analyze each of the claimed expenditures, I consider all of the circumstances, including the total expenses which have been incurred, Mr. Koerner's relative impecuniosity, and the necessity for deterrence. In my judgment, imposition of the total monetary sanction of $25,000 accomplishes the purpose of Rule 11.

The motion to dismiss the motion for sanctions filed by Mr. Koerner is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3763

OLD TIME ENTERPRISES, INC.,

Plaintiff-Appellant,

versus

INTERNATIONAL COFFEE CORP., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-89-1371-"H"(2))

(July 12, 1990)

Before GEE, POLITZ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

This matter returns on appeal following our remand,

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Old Time Enterprises v. International Coffee Corp., 862 F.2d 1213 (5th Cir. 1989). The district court dismissed the complaint with prejudice for failure to comply with its standing RICO order and for failure to state a claim. Old Time Enterprises, Inc. appeals that dismissal as well as the district court's refusal to permit the filing of another amended complaint and its imposition of Fed. R. Civ. P. 11 sanctions. Upon consideration of the record, briefs, and arguments of counsel, and finding neither error nor abuse of discretion, the judgment of the district court is AFFIRMED in all respects.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

OLD TIME ENTERPRISES, INC.	CIVIL ACTION
VERSUS	NUMBER 89-1371
INTERNATIONAL COFFEE CORPORATION, ET AL	SECTION "H"

ORDER AND REASONS

Before the court are plaintiff's motion for leave to file an amended RICO complaint, its motion for reconsideration, and defendant Nottebohm's motion for a protective order. For the following reasons, plaintiff's motions are denied, and defendant Nottebohm's motion for a protective order is dismissed as moot.

Plaintiffs' Motion for
Leave to File an Amended RICO Complaint

Plaintiff moves for leave of the court to file an amended RICO complaint. In support of this motion, plaintiff argues that it has a "right" to amend as a matter of course; alternatively, that it should be granted leave to amend in the interest of justice.

Plaintiff asserts that leave to amend its complaint was first requested in its opposition to defendants' motion to dismiss, and therefore it may amend as a matter of course pursuant to Fed.R.Civ.P. 15(a). Suffice it to say that if plaintiff had any grounds for amending, it should have attempted to amended its complaint as a matter of right at that time. *See Glen v. First National Bank In Grand Junction*, 868 F.2d 368 (10th Cir. 1989). In response to defendant's motion to dismiss plaintiff chose to stand on the validity of its complaint, requesting in the alternative that we permit it to amend the complaint should we find it lacking. *See* Plaintiff's Memorandum in Opposition to Motion to Dismiss at 1. Such a request does not rise to the status of a motion. *Glen, supra* at 370. Moreover, we disagree with plaintiff's characterization of its complaint as a "first" amended complaint. Such a characterization ignores the protracted history of this litigation.

We also disagree with plaintiff's claim that it is in the interest of justice to grant its motion for leave to amend. To the contrary, justice dictates that we deny plaintiff's re-

quest. Plaintiff has had several opportunities to state a claim, and has yet to do so. Furthermore, the proposed amended complaint does not state a claim with the clarity required by our standing RICO Order. *See* Moore's Fed. Prac. ¶ 15.10 at p. 15-106. Defendants have been forced to expend a vast amount of legal resources to defend a suit based on facially insufficient pleadings. Such litigation can not go on indefinitely.

Plaintiff's Motion for Reconsideration

Plaintiff moves for reconsideration of our judgment dismissing its complaint and imposing sanctions.

We disagree with plaintiff's claim that the Court of Appeals decision gives plaintiff the right to begin this litigation anew. While plaintiff's inability to comply with our Standing RICO Order may have been understandable in light of the unsettled nature of the case law at the time the original complaint was filed, it is clear that such defects are not to be tolerated in subsequent pleadings. *Old Time Enterprises Inc. v. International Coffee Corporation,* 862

F.2d 1213, 1220 (1989). Plaintiff has failed to state any meritorious grounds for relief from our judgment, under either Federal Rule 59 or 60.

Nottebohm's Motion for a Protective Order

In light of our findings above, defendant Nottebohm's motion for a protective order is dismissed as moot.

October 25, 1989

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

OLD TIME ENTERPRISES, INC.	CIVIL ACTION
VERSUS	NO. 89-1371
INTERNATIONAL COFFEE CORP., WILLIAM G. MADARY, MICHAEL L. BROWNING, CARLOS L. NOTTEBOHM AND CLIFFORD SPUHLER	SECTION "H"

JUDGMENT

Considering the court's Order and Reasons filed herein on August 17, 1989, and further considering the court's direction as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, International Coffee Corporation, Michael L. Browning, Clifford Spuhler, William G. Madary, and Carlos L. Nottebohm, and against plaintiff, Old Time Enterprises, Inc., dismissing plaintiff's complaint and imposing sanctions for those costs incurred due to plaintiff's failure to conform to the court's RICO Standing Order.

New Orleans, Louisiana, this 18th day of August,

1989.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

OLD TIME ENTERPRISES, INC.	CIVIL ACTION
VERSUS	NUMBER 89-1371
INTERNATIONAL COFFEE CORPORATION, ET AL	SECTION "H"

ORDER AND REASONS

Before the court are a Motion to Strike, to Dismiss and for Sanctions filed on behalf of defendant Carlos Nottebohm; a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted filed on behalf of defendants International Coffee Corporation, William Madary, Michael Browning, and Clifford Spuhler [hereinafter International Defendants]; and a Motion for Order Confirming Adequacy of Compliance with RICO Standing Order filed on behalf of the plaintiff, Old Time Enterprises. For the following reasons, Nottebohm's and International Defendants' motions are granted, and plaintiff's motion for an order confirming the adequacy of compliance with the court's RICO Standing Order is denied.

Judgment will be entered dismissing plaintiff's complaint and imposing sanctions for those costs incurred due to plaintiff's failure to conform to the court's RICO Standing Order.

This is plaintiff's second RICO complaint involving the same business relationships among the parties. We dismissed Old Time's previous RICO complaint; the Fifth Circuit affirmed but modified the dismissal to be without prejudice. *Old Time Enterprises v. Intern. Coffee Corp.*, 862 F.2d 1213, 1220 (5th Cir. 1989). This second complaint was filed after considerable discovery and entry of a RICO Standing Order in the previous litigation; it is nearly 150 pages long, including attached schedules, and incorporates the plaintiff's response to our RICO Standing Order. In spite of repeated direction from this court and the Fifth Circuit, many of the defects apparent in the plaintiff's previous submissions are present in this complaint as well.

Since the basis of plaintiff's RICO claim is fraud, in addition to providing "simple concise and direct" statements in the pleadings, the plaintiff must plead its allegations

with factual specificity. Fed.R.Civ.P. 8(a) & 9(b); *Old Time, supra*. at 1217. The purpose of these rules is to insure that a RICO claim is pleaded "with sufficient intelligibility for a court or opposing party to understand whether a valid claim is alleged and if so what it is." *Id.* at 1218

Moreover, after the plaintiff has been given notice of the pleading requirements, as is the case here, a district court and opposing parties are not required to sift forever through non-conforming pleadings. *Id.* at 1219. The clarity and intelligibility required by the Federal Rules of Civil Procedure are simply absent from the complaint before us. Like the plaintiff's previously dismissed complaint, this document contains vague, confusing, and meaningless cross-referencing which make it essentially incomprehensible. *Id.* at 1218.

For example, in response to RICO Standing Order No. 11, ¶ 9 of the complaint refers to paragraphs referenced within paragraphs, ultimately incorporating over half of the 109 paragraph complaint. Likewise, the plaintiff responds to Standing Order No. 8 stating, "see the discussion in ¶¶

40-86." Paragraphs 40-86 refer to and incorporate a majority of the complaint as well, and also reference a host of attached schedules and exhibits. The Fifth Circuit has previously cautioned plaintiff about the impropriety of such responses to our Standing Order: such broad and sweeping statements are "woefully inadequate". *Id.* at 1219. In spite of instructions from this court and the Fifth Circuit, the confusing cross-referencing is repeated throughout the complaint.

The complaint is also defective in that the plaintiff attempts to establish the existence of a RICO "enterprise" by pleading in ¶¶ 90-96, conclusory allegations supported only by a host of irrelevant documents.[1] 1 For example, such comments as "Spuhler represented himself as the authorized representative of 'Shadow' Old Time," in ¶ 92 are nonsense. The term "Shadow" Old Time was unknown

[1] The documents referenced by the plaintiff in ¶¶ 90-96 may be relevant to the establishment of the predicate acts of a "pattern of racketeering", but they do not aid in the establishment of an "enterprise."

to Spuhler prior to its invention at oral argument in this case's appeal. Furthermore, the documents referred to in ¶ 92 (schedule BR4.SYF) fail to indicate, on their face, any evidence of the alleged "Shadow" enterprise. Thus, the statement and the documents cited in support of it are meaningless in this context. Suffice it to say that such unclarified generalities and conclusory allegations do not state a cause of action. *Id.* at 1219.

Throughout the complaint, the plaintiff also confuses the establishment of a RICO enterprise with the predicate acts necessary to prove a pattern of racketeering activity. For example, "the unauthorized use as a RICO enterprise of the name and roaster contracts of Old Time Enterprises, Inc.," is simply not an allegation that establishes "Shadow" Old Time as an interstate enterprise and cannot possibly constitute a RICO claim. *See* Complaint, at ¶ 90 (relying on this description to establish "Shadow" Old Time's status throughout the complaint); *see also Old Time, supra*, at 1217 (the Fifth Circuit explaining that such allegations can not possibly constitute a RICO claim).

A careful reading of the plaintiff's complaint in a light most favorable to it, shows that it has failed to establish the existence of a RICO enterprise separate and apart from the pattern of activity from which it allegedly engaged as required by the Fifth Circuit in *Old Time, supra.*, and *Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438 (5th Cir. 1987), *cert. denied* 483 U.S. 1032. We are not convinced to the contrary by plaintiff's circular reasoning that because "Shadow" Old Time allegedly was used to engage in patterns of racketeering, the enterprise and the patterns are "obviously separate". *See* Old Time's Memorandum in Opposition to International Defendants' Motion to Dismiss, Record Doc. 31, at 6. To withstand a motion to dismiss, "a complaint must affirmatively state a cause of action not merely fail to negate the existence of one." *Old Time, supra,* at 1220.

Plaintiff's allegations that false representations made in connection with pending litigation constitute mail fraud add nothing. We agree with the district courts that have so held and adopt their reasoning. *See Morin v.*

Trupin, 711 F.Supp. 97 (S.D. N.Y. 1989); *McMurty v. Brasfield*, 654 F.Supp. 1222 (E.D.Va. 1987); *Paul S. Mullin & Assoc, Inc. v. Bassett*, 632 F.Supp. 532 (D.Del. 1986); *Spiegel v. Continental Ill. Nat. Bank*, 609 F.Supp. 1083 (N.D.Ill.1985), *aff'd.*, 790 F.2d 638 (7th Cir 1986), *cert. denied*, 479 U.S. 987.

This complaint is the fourth time that the plaintiff has had the opportunity to comply with the RICO Standing Order; it has failed once again even to approach compliance with the requirements so clearly outlined in *Old Time, supra*. Thus, sanctions are appropriate pursuant to Fed.R. Civ.P. 11. *See Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) (en Banc). The court will fix the amount of sanctions after a contradictory hearing on motion of defendants.

New Orleans, Louisiana, this 17th day of August, 1989.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3870

OLD TIME ENTERPRISES, INC.,

Plaintiff,

VERSUS

MICHAEL L. BROWNING, et al.,

Defendants,

INTERNATIONAL COFFEE CORP. and
CARLOS NOTTEBOHM

Defendants -Appellees,

VERSUS

LOUIS R. KOERNER, JR.,

Movant-Appellant.

ON PETITION FOR REHEARING

(February 16, 1993)

Appeal from the United States District Court
for the Eastern District of Louisiana

Before REAVLEY, SMITH, and EMILIO M. GARZA,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:
Jerry E. Smith
United States Circuit Judge